

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**NEISES CONSTRUCTION CORP.**

**and**

**CASES 13-CA-135991  
13-CA-139977**

**INDIANA/KENTUCKY/OHIO REGIONAL  
COUNCIL OF CARPENTERS**

**NEISES CONSTRUCTION CORP.**

**Employer**

**and**

**CASE 13-RC-135485**

**INDIANA/KENTUCKY/OHIO REGIONAL  
COUNCIL OF CARPENTERS**

**Petitioner**

**OPPOSITION TO RESPONDENT'S PETITION TO  
PARTIALLY REVOKE SUBPOENA DUCES TECUM**

On January 20, 2015, the National Labor Relations Board issued a Subpoena Duces Tecum to Respondent Neises Construction Corporation (“the Subpoena”). On January 29, 2015,<sup>1</sup> the Respondent filed a Petition to Partially Revoke the Subpoena (“the Petition”) with Region 13, arguing that the Subpoena seeks documents protected from disclosure by the attorney-client privilege or the work product doctrine and that certain items requested are variously “impossible” to furnish, irrelevant and overbroad, over burdensome, and redundant. Specifically, Respondent only seeks to revoke the Subpoenas as to items 1, 9(b), and 10 and

---

<sup>1</sup> On January 29, 2015, Counsel for the General Counsel received the signed United States Postal Service Return Receipt for subpoena number B-1-KTS8G7. According to the return receipt, the Subpoena was received by Respondent on January 23, 2015. Therefore, on January 29, 2015, Counsel for the General Counsel contacted Respondent’s counsel, Art Johnson, by e-mail to ascertain whether Respondent would provide the subpoenaed documents on February 2, 2015, as requested. At that point, Respondent’s counsel informed Counsel for the General Counsel for the first time that it had filed the Petition the previous day by e-file and enclosed a copy of the Petition. The Region did not receive service of the Petition on January 28, 2015, by e-file or e-mail. On February 3, 2015, Counsel for the General Counsel discussed the Subpoena and Petition with Respondent’s counsel. The parties were unable to resolve the disputed items.

items 2, 3, 4, 5, 8, 9 for the time period of January 1, 2014-August 28, 2014, only. Therefore Respondent admits that it is obliged to produce items 6 and 7 of the Subpoena since January 1, 2014, to the date that the subpoena is returnable, as well as those documents responsive to items 2, 3, 4, 5, 8, and 9(a) for August 29, 2014, to the date that the Subpoena is returnable.

The General Counsel requests that the Petition be denied because (1) the Subpoena seeks information relevant to the allegations contained in the Consolidated Complaint; (2) the Subpoena is reasonably tailored to encompass a time period relevant to allegations contained in the Consolidated Complaint; and (3) the Subpoena describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Further, Respondent has failed to establish any other legal basis for revoking the Subpoena.

**RESPONDENT'S PETITION TO PARTIALLY REVOKE THE HEARING  
SUBPOENA DUCES TECUM ISSUED RESPONDENT SHOULD BE DENIED**

Respondent's Petition challenges all but two of the subpoenaed document categories on various meritless grounds. As a preliminary matter, Respondent generally argues (Petition, p. 2) that the Subpoena should be revoked to the extent<sup>2</sup> that any documents sought are protected by attorney-client privilege or the work product doctrine. The procedure to be followed in the case of any such documents is, in fact, thoroughly explained in the "Definitions and Instructions" section of the subpoena itself: a claim of privilege must be expressly made for the allegedly privileged document and Respondent must describe the nature of the withheld document, communication, or tangible thing in a manner that, without revealing information itself privileged or protected, will enable an assessment of the claim to be made, e.g. a privilege log.

---

<sup>2</sup> Likewise, the Subpoena by its terms expressly seeks only documents in Respondent's possession, custody, or control. Therefore, Respondent's argument that the Subpoena should be revoked to the extent that it seeks documents outside of Respondent's possession, custody, and control is simply baffling.

See NLRB Judge's Bench Book, § 8–405 (Aug. 2010). That some responsive documents may be privileged or work product does not absolve Respondent from otherwise complying with the Subpoena or serve as ground to revoke the Subpoena.

Taking each of the Respondent's remaining contentions in turn, Respondent first claims (Petition, p. 1) that the items sought in paragraph 1 of the subpoena attachment—recordings of unit employee interactions in the Respondent's back parking lot on August 18, 2014—are impossible to provide. Respondent states that its video recording system was turned off on that date due to the election in case number 13-RC-135485. However, the election in that case was on October 3, 2014, not August 18, 2014. In addition to its mistake of fact, Respondent states that its "video system has been undergoing technical difficulties recently and video footage has not been consistently captured." This assertion does not amount to the impossibility of supplying whatever video footage Respondent has in its possession for August 18, 2014, that is responsive to the Subpoena. Assuming that the video footage is not privileged and meets the Board's other standards as expressed in its rules and case law, Respondent must produce responsive documents in its possession or under its control if any such documents exist.

Next, Respondent attacks the Subpoena on the ground that the time period defined in the subpoena attachment—from January 1, 2014, through the date the Subpoena is returnable—is overbroad and irrelevant as to Paragraphs 2, 3, 4, 5, 8, 9, and 10. (Petition, p. 2) Critically, except for items 9(b) and 10, Respondent in no way challenges the underlying relevance of the documents other than the time period for which they are sought. Thus, Respondent implicitly concedes that the types of documents sought in these paragraphs of the subpoena are relevant and must be provided.

As to its arguments regarding the time period, Respondent is simply wrong. These subpoenaed items are well within the Board's definition of relevancy as they directly relate to the allegations in the Consolidated Complaint. Pursuant to the Board's Rules, subpoenaed information must be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board's Rules, Section 102.31(b) and *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998) (information needs to be only “reasonably relevant”). Respondent's claim that only documents that are from on or after August 29, 2014—the date of Dominick Valenta's discharge—are relevant is absurd. This contention lacks support in reason and Board law.

Paragraphs 2, 3, 4, 5, 8, and 9 of the Subpoena are relevant to the issues of Respondent's unlawful threats to close and lay off employees, more strict enforcement of its attendance policy, and Respondent's discharge of employee Dominick Valenta because of his union activity as alleged in Consolidated Complaint paragraphs V(a-b), VI(a-c), VII, and VIII. Paragraph 10 of the Subpoena is relevant to the issue of Respondent's posting a notice at its facility more strictly enforcing a requirement for employees to obtain Commercial Driver's Licenses as alleged in Consolidated Complaint paragraph V(c). The Subpoena only seeks information from the beginning of the calendar year in which the alleged unfair labor practices occurred until the start of the hearing. This is a reasonable and limited time period for the General Counsel to seek documents relating to the Employer's policies, practices, and statements regarding Respondent's knowledge of employees' union activity, any animus that Respondent displayed against that activity, documents that show how Respondent administered its attendance policy, and documents relating to an alleged requirement that employees obtain Commercial Driver's

Licenses. For these reasons, Paragraphs 2, 3, 4, 5, 8, 9, and 10 are neither irrelevant or overbroad.

Respondent further argues that Paragraph 9(b) requesting timecards showing start and end times for Respondent's employees is unnecessarily time-consuming and redundant given that the subpoena also requests attendance sheets and other records in Paragraph 9(a). A subpoena is not unduly burdensome simply because it requires the production of a large number of documents. To satisfy its burden, the party seeking revocation of a subpoena must show that production of the subpoenaed information "would seriously disrupt its normal business operations." *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513–514 (4th Cir. 1996).

Respondent has plainly not satisfied that burden here. In fact, Respondent has not even made an offer of proof as to what steps would be required to provide the responsive timecards requested in Paragraph 9(b) of the Subpoena. Moreover, the timecards are essential to validate the attendance sheets and records requested in Paragraph 9(a). The timecards are the underlying documents that establish whether the attendance sheets and records are accurate; they are not redundant. See *PPG Industries*, 339 NLRB 821, 821 (2003) (administrative law judge erred by granting respondent's petition to revoke on the ground that requiring production of certain attendance records would be unnecessarily cumulative and/or duplicative of information already available to the General Counsel).

Finally, Respondent argues that Paragraph 10 of the Subpoena should be revoked because the Complaint allegation for which it requests responsive documents was "revoked" or "withdrawn" from the original charge. Respondent is again factually incorrect. The charge in Case 13-CA-139977 alleged in pertinent part that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by the following conduct: "...posting a notice regarding a new requirement

that all employees must have a CDL license.” The December 29, 2014, letter to Respondent’s owner, Brian Neises from Acting Regional Director Daniel N. Nelson (Respondent’s Exhibit 2) approved a withdrawal request for the 8(a)(3) allegation, but reserved for separate resolution the remaining allegations that the Respondent’s conduct also violated Section 8(a)(1) and (5) of the Act. Complaint issued on the Section 8(a)(1) allegation only.<sup>3</sup> Thus, as explained above, Paragraph 10 of the Subpoena is relevant to Paragraph V(c) of the Consolidated Complaint and there is no basis to revoke this aspect of the Subpoena.

Based on all of the forgoing, the Respondent has failed to meet its burden of establishing that any part of the Subpoena should be revoked. Accordingly, the Respondent’s Petition should be denied.

DATED at Chicago, Illinois, this 4th day of February, 2015.

Respectfully Submitted,

---

Renée D. McKinney  
Counsel for the General Counsel  
National Labor Relations Board  
Region Thirteen  
209 South LaSalle Street, Suite 900  
Chicago, Illinois 60604  
Telephone: (312) 353-7596  
Fax: (312) 886-1341  
E-mail: renee.mckinney@nrlrb.gov

---

<sup>3</sup> The Section 8(a)(5) allegation is still pending resolution.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**NEISES CONSTRUCTION CORP.**

**and**

**Cases 13-CA-135991  
13-CA-139977**

**INDIANA/KENTUCKY/OHIO REGIONAL  
COUNCIL OF CARPENTERS**

**NEISES CONSTRUCTION CORP.**

**Employer**

**and**

**Case 13-RC-135485**

**INDIANA/KENTUCKY/OHIO REGIONAL  
COUNCIL OF CARPENTERS**

**Petitioner**

**CERTIFICATE OF SERVICE**

I hereby certify that I have, on this 4th day of February, 2015, served a copy of the above Opposition to Petition to Partially Revoke Investigative Subpoena Issued to Respondent by U.S. Mail or email to:

BRIAN NEISES  
NEISES CONSTRUCTION CORP.  
P.O. BOX 268  
CROWN POINT, IN 46308

ARTHUR C. JOHNSON, II, ATTORNEY  
JOHNSON IVANCEVICH, LLC  
250 E 90TH DR  
MERRILLVILLE, IN 46410-8102  
PHONE: (219) 769-0087  
EMAIL: ACJ@JOHNSONI.COM  
FAX: (219) 769-0092

STEVEN A. JOHNSON, ATTORNEY  
JOHNSON IVANCEVICH, LLC  
250 E 90TH DR  
MERRILLVILLE, IN 46410-8102  
PHONE: (219) 769-0087  
EMAIL: SAJ@JOHNSONI.COM  
FAX: (219) 769-0092

SUZANNE C. DYER, ESQ.  
PAUL BERKOWITZ & ASSOCIATES, LTD.  
123 W MADISON ST STE 600  
CHICAGO, IL 60602-4625  
PHONE: (312) 419-0001  
MOBILE PHONE: (203) 887-0870  
EMAIL: SUZANNE@PTBLAW.COM  
FAX: (312) 419-0002

PAUL T. BERKOWITZ, ESQ., ATTORNEY  
PAUL BERKOWITZ & ASSOCIATES, LTD.  
123 W MADISON ST STE 600  
CHICAGO, IL 60602-4625  
PHONE: (312) 419-0001  
MOBILE PHONE: (312) 925-8420  
EMAIL: PAUL@PTBLAW.COM  
FAX: (312) 419-0002

---

Renée D. McKinney  
Counsel for the General Counsel  
National Labor Relations Board  
Region Thirteen  
209 South LaSalle Street, Suite 900  
Chicago, Illinois 60604  
Telephone: (312) 353-7596  
Fax: (312) 886-1341  
E-mail: renee.mckinney@nlrb.gov